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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 785

ALVIN GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam order of the court of appeals affirming the conviction (I R. 28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1962 (I R. 29; Pet. A. 1). A petition for rehearing was denied on January 9, 1963 (I R. 30; Pet. A. 3). The petition for a writ of certiorari was filed on February 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict.

2. Whether money taken from petitioner at the time of his arrest was properly received in evidence.

STATEMENT

In the United States District Court for the Southern District of California, petitioner was convicted by the court without a jury on three counts of an indictment charging narcotic offenses (counts 2, 4 and 5), and was given the minimum sentence for a second offender, ten years on each count to run concurrently (I R. 14). Count 2 charged the transportation and concealment of .6 grams of heroin in violation of 21 U.S.C. 174; count 4 the transportation and concealment of 250 milligrams of cocaine; and count 5 the transportation and concealment of 2 grams of cocaine, all on November 10, 1960 (I R. 3, 5–6).

1. The evidence for the government may be summarized as follows:

Hersley Jones, a special employee of the office of the Sheriff of Los Angeles County (II R. 23) was searched by state officers at about 10 a.m. on November 10 and given $150 in currency, the numbers of the bills having been recorded (II R. 25, 30). Jones, followed by deputy sheriffs, drove to the vicinity of the apartment house where petitioner lived, got out of the car and walked toward the house (II R. 30). About 20 minutes later Jones reappeared and was followed to a place about a quarter of a mile away. When he was searched, the listed money was not on his person or in his car (II R. 30–32). Three quarters of an hour later surveilling officers saw Jones go back to the apartment house, and saw petitioner get into his own car and drive away, followed by Jones (II R. 32–34). After traveling some distance, both cars stopped. Petitioner walked up to a hydrant or stop

sign, bent down, then went to Jones' car, sat there for two to four minutes, returned to his own car and drove off (II R. 34). Jones subsequently met the officers and gave them a package (II R. 45–47) which contained heroin and cocaine (II R. 19–20). This was the basis of counts two and four. The money given to Jones was found on petitioner's person after his arrest (II R. 27–28).

Petitioner was followed after he left Jones and was seen to stop in an alley which bordered an ivy-covered fence. Petitoner leaned out and made a motion with his left hand toward the ivy. After petitioner drove away the agents found in the ivy a blue balloon containing smaller balloons, each of which held a crystalline substance. No other object was seen in the ivy (II R. 36, 71–72, 94–95; III R. 251, 253–254, 259).[1] The substance was cocaine (II R. 19–20). This incident was the basis of count 5.

At 4:30 that afternoon Mr. Renfro (a co-defendant charged in a conspiracy count on which both were acquitted) was seen with petitioner at the alley searching for something in the ivy. Petitioner made a thorough search on foot and at one point got into his car, drove into the alley, leaned out with his hand extended and then ruffled the ivy, duplicating his actions of a few hours earlier (II R. 75–76, 97–98).

Later the two drove in their respective cars to another alley where petitioner got out, picked up a white object near a telephone pole and returned to his

[1] A telephone repairman saw someone drop something in the ivy at the time and place described by the officers but could not identify the individual (II R. 64–66).

car. Both cars then drove off and stopped. Renfro went to petitioner's car for a moment and walked back to his own car, discarding a white object. After he drove off, Refro was stopped and arrested (II R. 77–80, 98–100).

Officers, including a federal agent and deputy sheriff William Farrington, then went to petitioner's house and arrested him (II R. 101–102). Petitioner said he had previously purchased $1100 worth of cocaine and $250 worth of heroin from one Lopez (II R. 102).

2. Before trial petitioner made a motion to suppress evidence of the money taken at the time of his arrest (I R. 10–12), on the ground that the officers acted without a warrant. At the hearing petitioner testified as to the manner of arrest and the court denied the motion (R. II 5–19). Further testimony as to probable cause and the manner of arrest was developed at the trial.

The evidence bearing on probable cause has already been detailed. On the question of arrest and search, officer Farrington testified that petitioner's stepdaughter answered his knock through the window and he asked if Alvin (petitioner) was home. When she said yes, he told her to tell petitioner Billy Farrington was there. After she did so, he heard petitioner say, "Tell him to come on in." (II R. 101, 111.) Petitioner was told he was under arrest and the house was searched (II R. 102, III R. 148–149). Money which petitioner tried to give to his wife was compared with the list the officers had prepared. The officers kept the listed bills (II R. 27–28, III R. 149).

Petitioner testified, both on the motion to suppress and at the trial, that the officers entered the house without permission and searched it before they arrested him, that they took the money he had previously given to his wife and arrested him after they had compared the numbers of the bills with their list (II R. 9–18; III R. 218, 221).

Petitioner's stepdaughter testified that she answered the door and was told by an officer to let them in. She said she would have to tell her mother and the officer said, "Tell him I'm Billy." She told petitioner that Billy was at the door. When she got back the officers were walking in (II R. 40). Petitioner admitted he knew deputy sheriff "Billy" Farrington (II R. 15).

ARGUMENT

Count 5, based on the cocaine found in the balloon discovered in the ivy, will alone support petitioner's sentence. *Lawn* v. *United States*, 355 U.S. 339, 359. Accordingly, the issues raised by the motion to suppress, challenging the use of the currency taken at the time of petitioner's arrest, are not necessarily before the Court. The money was tied to the sales to Jones which are the basis of counts 2 and 4; in no way is it related to count 5.

1. The sufficiency of the evidence to support the conviction is evident from the facts summarized in the Statement. With particular reference to count 5, the trier of fact, on the evidence, was fully justified in concluding beyond a reasonable doubt that the cocaine found in the ivy had been in petitioner's possession and had been dropped there by him just

before it was picked up by the officers. This conclusion was reinforced by the observations of petitioner and Renfro in searching in the ivy later in the afternoon.

Petitioner's attack on the presumption arising from possession is without merit. The validity of the presumption was sustained more than thirty years ago, *Yee Hem* v. *United States*, 268 U.S. 178, and has since been recognized by this Court. *Roviaro* v. *United States*, 353 U.S. 53; *Harris* v. *United States*, 359 U.S. 19. See also the government's brief in opposition in *Jennings* v. *United States*, No. 840 Misc., this Term.

2. The motion to suppress (assuming any issue with respect thereto is presented) was properly denied. The observations of the officers constituted probable cause for the arrest of petitioner. Under both state (California Penal Code, Sec. 836) and federal law (26 U.S.C. 7607), the officers and agents had authority to arrest without a warrant on probable cause to believe that the person arrested had committed an offense against the narcotic laws. There was no entry by force. Concededly petitioner's stepdaughter opened the door for the officers. The trier of fact had the right to credit Farrington's testimony that Farrington told the daughter to tell petitioner that "Billy" was there and that he entered when he heard petitioner tell the girl to let him in. There was ample evidence that petitioner was told he was under arrest before the money was taken.

As to the procedure on the motion to suppress, in a trial before the court without a jury, the court was

fully justified in deferring its decision until after the facts were developed at the trial so that there would be no necessity to hear twice the evidence as to probable cause and the manner of arrest.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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